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In The

Supreme Court of the United States

October Term, 1995

RAYMOND WALKER,

Petitioner,

vs.

HARRY K. RUSSELL, WARDEN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In reviewing the evidence brought through a habeas corpus proceeding claiming a conviction failed to satisfy the guarantee of the Fourteenth Amendment that no person shall be deprived of liberty without due process of law, should the federal courts, in evaluating the evidence so as to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, assess the probable certitude of the evidence tending to disprove guilt against the probable certitude of the evidence tending to establish guilt?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Raymond Walker, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 13, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the order of the United States District Court for the Northern District of Ohio is

reported at 57 F.3d 472 and is reproduced in the Appendix at A-1.

The memorandum opinion and order of the United States District Court for the Northern District of Ohio is reproduced in the Appendix at A-12. The report and recommendation of the magistrate judge is reproduced at A-16.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered June 13, 1995. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1), which provides for review of the judgment rendered by the United States Court of Appeals for the Sixth Circuit in this case by grant of a petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution and 28 U.S.C. §2254(a) are involved. The pertinent text is set forth in the Appendix at A-31 and A-32.

STATEMENT OF THE CASE

Raymond Walker, invoking 28 U.S.C. §2254, petitioned the United States District Court for the Northern

District of Ohio, to order his release from the Lima Correctional Institution, in which he had been sentenced to life imprisonment by reason of having been convicted on June 29, 1984, of committing murder in the first degree by a jury in the Court of Common Pleas of Stark County, which is located in Canton, Ohio. The jury found that on July 22, 1972, Walker, while participating in the robbery of an A&P Grocery Store in Canton, had shot and killed Guy Mack, an off-duty Canton policeman. On that day, however, Walker was incarcerated in the Cuyahoga County Jail located in Cleveland, Ohio, 60 miles from Canton.

In 1975, Warren Davidson and Fred Ogeltree inprisoned after having been convicted of participating in the robbery, accused Walker of participating with them and of killing Guy Mack. They made the accusation after consulting with Fred Meyers, a jailhouse lawyer, who advised them that they could not expect leniency unless they designated the triggerman in the robbery. Meyers testified that they told him that the third man had been a junkie from Detroit whose name and whereabouts they did not know, but that they would come up with a name. They designated Walker, who had been intimate with Ogeltree's wife, Dolores.

Walker was arrested several months later, indicted on March 12, 1976, and brought to trial. In the trial of that case, Walker called upon his friend, Lemar Potts, with whom he ran about on weekends, to testify that on July 22, 1972, a Saturday, he and Walker were together and that Walker was not in Canton. The prosecution checked Potts's work records and found that on that Saturday he had been working, and so destroyed his testimony. In

discussing the case that day, Walker and his trial counsel, Stanley Tolliver, suddenly recalled that Walker had been in the Cuyahoga County Jail in the spring and summer of 1972. Tolliver subpoenaed the jail records. The jury was unable to arrive at a verdict; we are told that ten jurors favored acquittal and two insisted upon conviction.

Walker was re-tried in September, 1976, and was found guilty in a proceeding in which the prosecution, with the concurrence of the trial judge, played upon the parochial tendencies of the local jurors by inveighing against Cuyahoga County in general and the Cuyahoga County Jail in particular. The conviction was affirmed by the Stark County Court of Appeals and the Ohio Supreme Court. Walker's petition for a writ of certiorari to this Court was denied and thereafter he petitioned the United States District Court for the Northern District of Ohio for a writ of habeas corpus, asserting that his conviction offended Fourteenth Amendment due process guarantees in that no rational finder of fact could have convicted him on the evidence presented, and also asserting that he was deprived of a fair trial by reason of the abuses in the introduction of irrelevant and scurrilous matter by the prosecution. The case was referred to a magistrate, who agreed that no rational finder of fact could have convicted Walker, and that by reason of the introduction of prejudicial evidence he had been deprived of a fair trial. On review, the district judge agreed that the trial was fundamentally unfair and ordered a re-trial, but found the evidence sufficient to support a verdict of conviction. The Sixth Circuit affirmed. *Walker v. Engle*, 703 F.2d 959 (6th Cir. 1983).

Walker was brought to trial for a third time in June of 1984, and was convicted. The conviction was affirmed by the Stark County Court of Appeals and the Ohio Supreme Court declined review. It is from that conviction that the petition for a writ of habeas corpus was filed in this case. Although the petition included a ground complaining of the challenge by the prosecution to the sole black juror on the panel, Walker proceeded only on the contention that no rational finder of fact could have found him guilty on the evidence adduced. The magistrate judge to whom the petition had been referred was also the magistrate who had considered the petition from the second trial. In reviewing the evidence of the third trial, the magistrate judge indicated that he felt bound by the determination in the initial habeas corpus proceeding of the district judge and the Sixth Circuit that the properly admitted evidence in the second trial was sufficient to sustain conviction, concluded that the evidence in the third trial mirrored the admissible evidence in the second trial with the sole exception that Davidson testified that Walker had not been present in Canton at the robbery and Ogeltree had refused to testify, and recommended that the writ be denied. On review, the district judge adopted the recommendation of the magistrate judge and the Sixth Circuit affirmed. This petition is made from the decision of the Sixth Circuit affirming the denial of Walker's petition for a writ of habeas corpus by the district court.

The evidence adduced in the third trial of Walker tending to support conviction may be identified as follows:

1. The transcript of Warren Davidson's testimony from the first trial, read to the jury after Davidson had testified that Walker was not present at the robbery and did not murder Guy Mack;

2. The transcript of the testimony of Fred Ogeltree from the second trial, read to the jury after, unbeknownst to the jury, Ogeltree advised the trial court that he would not testify for fear that he might incriminate himself;

3. Bertha Jones, also known as Renee Clark and Renee Hall, a customer at the supermarket, identified Walker as the person who had shot Guy Mack, stated that she had picked out his picture from an assortment of photographs shown to her shortly after the murder, and dismissed the fact that she had failed to identify him in the line-up in March, 1976, by stating that she knew it was him but out of fear failed to designate him and instead designated another of the men in the line-up, marking her designation with a question mark;

4. Mable Mack, wife of the decedent, Guy Mack, positively identified Walker as the man who had killed her husband, even though in the previous two trials she declined to positively identify him but merely stated that he looked very much like the man, and even though she had failed to pick him out of the line-up but rather identified the person mistakenly designated by Renee Clark;

5. Willa May Hart testified that while she was sitting on her porch on the day of the crime, she saw a car speeding past her house driven by a man with a bad skin condition similar to that of Walker; and

6. Clarence Cash, a friend of Ogeltree, testified, as he had in the second trial, that in June of 1972, he had seen Walker walking the streets of Cleveland's Glenville ghetto.

The evidence tending to absolve Walker of the crime may be fairly identified as follows:

1. The records of the Cuyahoga County Jail designating Walker as an inmate and certifying that he was there continuously from April 14, 1972, until his release on August 1, 1972, as well as the records of the Court of Common Pleas of Cuyahoga County showing appearances by Walker during this period;

2. The testimony of four fellow prisoners residing on the block with Walker in the Cuyahoga County Jail that Walker was continuously in jail during this period;

3. The testimony of Warren Davidson that he had lied in the previous trials regarding Walker's involvement in the robbery and stating positively that Walker was not present and did not murder Guy Mack;

4. The testimony of Fred Meyers relating the remarks of Ogeltree that he was unable to identify the person who had shot Guy Mack and that he would designate his wife's lover;

5. The testimony of Dolores Ogeltree that Fred Ogeltree had admitted to her that Raymond Walker had not shot Guy Mack and had not participated in the robbery; and

6. Four witnesses to the murder who viewed the line-up but identified none of the men standing there, including Walker, as participants in the robbery.

Although an Ohio trial judge, three Ohio appellate judges, a magistrate judge, a federal district judge and three federal circuit judges determined that the evidence was sufficient to support some rational finder of fact in concluding that Walker was guilty of the crime charged, we submit that they erred in failing to consider all the evidence and to evaluate its relative strength, but rather simply placed credence on the prosecution's case, disregarding its frailty when compared to the overwhelming evidence that Walker could not have committed the crime because he was in jail at the time. Petitioner seeks review by writ of certiorari from this Court.

ARGUMENT

This Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), following its holding in *In re Winship*, 397 U.S. 358 (1970), at page 364, "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt," noted at page 316:

> The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. * * * Under *Winship*, which established proof beyond a reasonable doubt as an essential

> of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.

This Court therefore overruled *Thompson v. Louisville*, 362 U.S. 199 (1960), in which it held that a state criminal conviction did not offend the Due Process Clause except when there was no evidence supporting the conviction. The facts in *Jackson* did not fit the holding, and so this Court upheld the conviction. The facts of this case fully fit into the holding of *Jackson v. Virginia*.

In *Jackson v. Virginia* this Court held at 443 U.S. 318 as follows:

> After *Winship*, the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be * * * to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby v. INS*, 385 U.S., at 282, 87 S.Ct., at 486 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624-1625. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is

> preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

In *Jackson* this Court gave no guidance relating to the quantification to be applied by the reviewing federal courts in considering the evidence in the light most favorable to the prosecution. The phrase "light most favorable to the prosecution" suggested to the courts below herein that factors supporting the defense are to be disregarded. As applied, for example, the fact that Walker induced his friend, Lemar Potts, to testify falsely that they were running about together on July 22, 1972, regarded in the light most favorable to the prosecution, leads to the conclusion that Walker's other evidence is also unreliable. Does regarding this fact favorably to the prosecution require disregarding the obvious unlikelihood that a person of sufficient skill and intelligence to sneak out of the Cuyahoga County Jail, go to Canton, commit murder, and sneak back into jail would three years later forget his alibi.

The courts below paid lip service to *Jackson*, but applied the "no evidence" standard of *Thompson v. Louisville*. We urge this Court to accept jurisdiction over this case and that it hold that the federal courts on habeas corpus review of a conviction claimed to be constitutionally defective examine all of the evidence, evaluate it most favorably to the prosecution but that in the evaluation it not disregard factors that no rational finder of fact

could disregard in the process of reaching the subjective certitude demanded by the reasonable doubt standard.

The unsuitability of simply accepting on habeas corpus review of a conviction the evidence of guilt is demonstrated in this case, in which the evidence favorable to the prosecution consists of fleeting identifications by strangers and the testimony, subsequently repudiated, of accomplices. Experience has demonstrated that neither provides a comfortable level of certitude. The evidence that Walker was in jail, however, does not lend itself to the casual dismissal by Judge Contie in footnote 1 of the Opinion at 57 F.3d 474 (A-4), in which he notes:

> The jury rejected Walker's claim that he was incarcerated on July 22, 1972. Though we are, of course, troubled by the evidence supporting Walker's alibi, numerous witnesses testified that the jail's record-keeping procedures were weak and, at times, non-existent. In fact, inmate counts fluctuated daily without explanation and the "head counts" often differed from the number of inmate "cards" recorded each day. Indeed, "head counts" were often not taken. Moreover, numerous corrections officers testified that the Cuyahoga County Jail was overcrowded, *see, e.g.*, Trial Transcript at 1113 ("We had too many men sleeping in the cells, men were sleeping on the floor, in the day room, in the aisles, men were sleeping everywhere."), and run by inmates. *See Id.* at 1114 (deputies often relied on inmate "range bosses" to count the inmates).

There was no inaccuracy in the records that counted, however, those at the jail's booking desk. Should the nightly body count disclose a disparity, a cellblock search

ensued that was not concluded until the body count corresponded with the records. There was less urgency to accurately reflect the internal movements in the jail controlled by the floor reports, and so understandably the personnel did not place the same significance upon reconciling these records as it did upon the crucial data at the booking desk. The records of the Cuyahoga County Jail and of the Clerk of the Cuyahoga County Court of Common Pleas demonstrated that Walker was in jail from April 14, 1972, to August 1, 1972. On April 14, 1972, Walker was photographed at the Cuyahoga County Jail and identified in the 1984 trial as the same person whose photograph was taken. The prosecutor stipulated to the fact that the records of the Cuyahoga County Jail and of the Clerk of Courts demonstrated that Walker was in jail during this period. On July 21, 1972, the day before the murder, during which the accomplices related they drove to Canton, Walker had placed five dollars into his commissary account. Four inmates of the jail at that time who had been in the same cellblock with Walker testified that he was there continuously during that period. Deputies from the Sheriff's Office described the physical layout of the jail and the procedures followed, demonstrating that it would have been impossible for Walker to walk out of the jail and return to the jail at any time, including July 21st and 22nd of 1972. The booking desk in the basement of the jail is its main center. Everyone going in or out, whether it be prisoner, visitor, deputy sheriff, or lawyer, must pass by the booking desk. After one passed the booking desk, one must proceed through two gates, each of which is locked, and a locked door. Two elevators, each of them operated manually, carry persons to the upper

floors of the jail. If Raymond Walker had been on the streets on July 21 and 22, 1972, at least 50 persons would have been aware of it. There were 54 prisoners in the block with him. During each of the three shifts, there was at least one deputy on the floor and probably more, depending on the manpower. He would have had to have gone to the tenth floor to get his civilian clothes. Checking them out would have brought him into contact with at least one other person. He would then have had to get on the elevator, which was manually operated. The attendant would have known he was leaving. At the basement level, someone would have to unlock the door and the two gates. Thus, at least, one more person would have been aware that he was leaving. Then he must proceed past the booking desk, and at least one more witness, before reaching the street. No rational juror should have discounted this testimony.

In dissent, in review of the second trial, *State v. Walker*, 55 Ohio St. 2d 208 (1978), Justice Celebrezze made the following observation at page 221:

> In light of the nature of appellant's alibi evidence, vis-a-vis the evidence presented by the state in rebuttal of the alibi, there must be some doubt in a reasonable mind as to the guilt of appellant. To conclude otherwise is to argue that the average reasonable mind would be convinced that one confined in the Cuyahoga County Jail could manage to escape therefrom, could travel to another county, there to commit a murder, and could later re-enter the jail facility, undetected, only to be subsequently released by an order of the court. I believe it patently

apparent that such a theory is rife with reasonable doubt.

The judges reviewing this conviction failed to assess the quality of the evidence and its contribution to the certitude to be reached by the rational juror. By considering the evidence in light most favorable to the prosecution, they placed credence upon identification made upon a fleeting glance, solidified from its initial infirmity of failure in the line-up identification into positive designation by the third trial, and the testimony of accomplices substantially weaker than this traditionally suspect evidence by admissions of deception. An innocent man has been convicted and this Court sits as his last resort. The petition should be granted, not only to correct this injustice, but also to supplement the holding in *Jackson v. Virginia* with direction to the federal courts that in reviewing a state court conviction upon habeas corpus so as to ascertain whether the factfinder rationally applied the standard required by the Due Process Clause to sustain a conviction, it should assess the historic facts in light of the credence required to be given by logic and experience. The function is similar to that of the court in determining whether error is harmless or a confession coerced and the issue legal, calling for federal determination. *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Chapman v.*

California, 386 U.S. 18 (1967). We respectfully submit that this petition should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND WALKER, *Petitioner-Appellant,* v. HARRY K. RUSSELL, Warden, *Respondent-Appellee.*	)	ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed June 13, 1995

Before: CONTIE, RYAN, and SILER, Circuit Judges.

CONTIE, Circuit Judge. Raymond Walker seeks habeas corpus relief. The district court denied Walker's petition. We affirm.

I.

On July 22, 1972, police officer Guy Mack was shot and killed during a robbery of an A & P grocery store in Canton, Ohio. Officer Mack was off-duty and standing with his wife in a check-out line when he was shot in the head by one of the men attempting to rob the store. Customers and cashiers inside the A & P witnessed the

shooting. A customer standing outside the grocery store saw three men flee the scene. A neighborhood resident reported two cars speeding past her house immediately after the robbery and testified that she took a good look at one of the drivers.

Fred Ogletree and Warren Davidson were apprehended soon after the robbery and were convicted. Ogletree and Davidson subsequently identified petitioner-appellant Raymond Walker as the "trigger man." On March 12, 1976, the Stark County grand jury indicted Walker for the murder of Officer Mack. Walker's first trial ended in a hung jury.

Davidson and Ogletree testified for the state at Walker's second trial. Specifically, Davidson identified Walker as the crime's instigator and principal participant. Ogletree corroborated Davidson's testimony and identified Walker as the "trigger man." On September 8, 1976, the jury found Walker guilty of first degree murder. Walker received a life sentence.

Walker appealed his conviction unsuccessfully through the Ohio court system. After the United States Supreme Court denied his petition for writ of certiorari, Walker sought habeas corpus relief in district court. In his petition, Walker asserted that: (1) Ohio's appellate courts applied the wrong standard of review; (2) no rational trier of fact could have found him guilty beyond a reasonable doubt; and, (3) the cumulative effect of evidentiary errors infringed upon his right to a fair trial.

The magistrate judge recommended that Walker's petition be granted and that Walker be released from

prison. Though the district court agreed with the magistrate judge's conclusion that Walker's rights had been violated, the district court rejected the magistrate judge's recommended relief and, instead, ordered that Walker be retried. This court affirmed the district court's decision. *Walker v. Engle*, 703 F.2d 959 (6th Cir.), *cert. denied*, 464 U.S. 951, 962 (1983).

Walker was retried in June 1984. Though Davidson and Ogletree were again called as witnesses for the state, Davidson testified that Walker was not involved in the robbery or the murder and asserted that he could not remember whether Ogletree took part in the robbery, the names of the other participants, and the number of vehicles used in the robbery. The trial judge declared Davidson unavailable and allowed the prosecution to introduce into evidence an edited version of Davidson's 1976 trial testimony. Though Ogletree did not recant his 1976 testimony, he refused to take the stand at Walker's 1984 trial. Accordingly, the trial court declared Ogletree unavailable and his earlier testimony was admitted as substantive evidence.

Mable Mack (the decedent's wife), Bertha Jones, Willa May Hart and numerous others testified for the prosecution. Though Mack, Jones and Hart failed to identify Walker in a 1975 police lineup, Mack and Hart positively identified Walker as the gunman at trial. Jones, an A & P customer that witnessed the shooting, selected Walker's photograph from a photo array and positively identified Walker as the gunman at trial.

Walker, in turn, presented an alibi defense and attacked the credibility of the state's witnesses. Walker

insisted that he was incarcerated in the Cuyahoga County Jail on or about the day of the robbery. Though Walker offered witnesses and documents to support his alibi, the state, on rebuttal, produced testimony that Cuyahoga County Jail procedures were lax and that Walker might have walked out of the jail, and back into the jail, undetected.[1]

On June 29, 1984, Walker was found guilty of first degree murder and was sentenced to life imprisonment. Walker appealed his conviction on several grounds: the prosecutor's improper use of peremptory challenges; the admission of Davidson's prior testimony; and, insufficiency of the evidence. Though the Ohio appellate courts affirmed Walker's conviction, the United States Supreme Court granted Walker's petition for a writ of certiorari on the peremptory challenge issue[2] only, and remanded the case to the Stark County Court of Appeals to reconsider

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[1] The jury rejected Walker's claim that he was incarcerated on July 22, 1972. Though we are, of course, troubled by the evidence supporting Walker's alibi, numerous witnesses testified that the jail's record-keeping procedures were weak and, at times, non-existent. In fact, inmate counts fluctuated daily without explanation and the "head counts" often differed from the number of inmate "cards" recorded each day. Indeed, "head counts" were often not taken. Moreover, numerous corrections officers testified that the Cuyahoga County Jail was overcrowded, *see, e.g.*, Trial Transcript at 1113 ("We had too many men sleeping in the cells, men were sleeping on the floor, in the day room, in the aisles, men were sleeping everywhere."), and run by inmates. *See Id.* at 1114 (deputies often relied on inmate "range bosses" to count the inmates).

[2] Pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).

the prosecutor's use of peremptory challenges. *Walker v. Ohio,* 479 U.S. 1076 (1987).

Upon remand from the Stark County Court of Appeals, the state trial court determined that the prosecutor's use of a peremptory challenge to dismiss the only African-American on the jury venire was made in good faith and was not based on race. The Stark County Court of Appeals affirmed Walker's conviction. On March 1, 1989, the Ohio Supreme Court denied Walker leave to appeal. On June 19, 1989, the United States Supreme Court denied Walker's petition for a writ of certiorari. *Walker v. Ohio,* 491 U.S. 908 (1989).

On August 1, 1990, Walker filed a petition seeking habeas corpus relief in district court. Specifically, Walker alleged that no rational trier of fact could have convicted him, and that the prosecutor improperly dismissed the only African-American on the jury venire. Walker subsequently abandoned his peremptory challenge claim. Respondent-appellee Harry K. Russell, the Warden of the Lima Correctional Institution, filed his answer on October 29, 1990.

On March 9, 1994, the district court denied Walker's petition:

> Petitioner contends that no rational trier of fact could have convicted him. He asserts that he was in the Cuyahoga County Jail on the day the murder was committed in Canton, Ohio. In *Jackson v. Virginia,* the Court held that in a challenge to a state court conviction, the Petitioner is entitled to habeas corpus relief if it is found that upon the record addressed at trial no rational trier of fact could have found proof of guilt

> beyond a reasonable doubt. The proof requires such relevant evidence as a reasonable mind might accept to support a conclusion.
>
> . . . .
>
> Obviously, the jury did not believe [Davidson's] testimony in the 1984 trial. The Court agrees with the Magistrate Judge's statement that "such disbelief cannot be unreasonable." [Davidson] stated that he could not remember who was with him when the murder was committed. That is extremely hard to believe considering that the accomplice is spending a major portion of his life in prison because of this incident. Yet he cannot remember who was with him at that time? It certainly was reasonable for a jury not to believe his contradictory 1984 testimony. The jury could believe his testimony in the 1976 trial. The trier of fact has the responsibility to resolve conflicts in testimony, to weigh the evidence and draw reasonable inferences.
>
> Besides the accomplices, the prosecution presented several eyewitnesses who saw the petitioner at the scene of the murder. Also, testimony showed that jail procedures were somewhat careless. It cannot be determined that a rational jury could not have found proof of guilty [sic] beyond a reasonable doubt.

District Court's Memorandum and Order at 2-3 (citations omitted).

Walker timely appealed.

II.

Walker argues that "no rational trier of fact could find beyond a reasonable doubt that [he] was even present in Canton at the time of the robbery, much less guilty of the shooting." Appellant's Brief at 10. Specifically, Walker maintains that he "could not have been at the scene of the shooting because he was incarcerated in the Cuyahoga County Jail at the time the robbery occurred." Appellant's Brief at 11.

We must determine whether, after viewing the evidence (and the inferences to be drawn therefrom) in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The state need not rule out every hypothesis except that of guilt beyond a reasonable doubt, and the reviewing court need not be convinced of petitioner's guilt beyond a reasonable doubt. *Neal v. Morris*, 972 F.2d 675, 677-78 (6th Cir. 1992) (citation omitted). Moreover, the jury's credibility determinations are entitled to "special deference." *Brown v. Davis*, 752 F.2d 1142, 1147 (6th Cir. 1985). *See also United States v. Wynn*, 987 F.2d 354, 358 (6th Cir. 1993) ("Questions of credibility are primarily for the jury to decide.").

Both Ogletree and Davidson testified (at Walker's 1976 trial) that Walker was involved in the robbery.[3]

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[3] Though Davidson recanted his 1976 testimony implicating Walker at Walker's 1984 trial, the jury apparently rejected Davidson's 1984 testimony. In light of Davidson's purported memory lapses with respect to the robbery and murder, and his

Ogletree, in fact, testified that he saw Walker shoot Guy Mack.[4] Customers Mable Mack and Bertha Jones witnessed the murder and positively identified Walker as the gunman at trial. Willa May Hart, a nearby resident, positively identified Walker as the man driving away from the A & P immediately after the robbery. Cuyahoga County Jail officials rebutted Walker's claim that he was, without question, incarcerated at the time of the robbery and murder.

Though Walker claims that the district court improperly applied the "no evidence" rule to reach an unjust result,[5] the district court properly concluded that, after

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admission that he had previously lied and would lie again if it would benefit him, the jury reasonably rejected Davidson's 1984 testimony. Moreover, it is not for this court to weigh the credibility of the witnesses or to reach its own conclusion as to whether the evidence presented at trial established guilt beyond a reasonable doubt. We believe the magistrate judge phrased it well in his July 8, 1992 Report & Recommendation wherein he concluded:

> Although several aspects of this case remain unsettling to this Court, this Court cannot say that Davidson's 1984 testimony compels the conclusion that no reasonable jury could have found the evidence sufficient to convict. This Court must conclude that a rational jury assessing the facts of this case could have found beyond a reasonable doubt that Petitioner was guilty of first degree murder.

Report & Recommendation at 14 (citation omitted).

[4] Davidson claimed that he did not enter the A & P and, therefore, did not witness the shooting.

[5] Prior to *Jackson*, courts applied the "no evidence" standard of review set forth in *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Under the "no evidence" standard, "a state violates a defendant's constitutional due process when it convicts the

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt (pursuant to *Jackson*).

Though Walker also asserts that the district court "appl[ied] an excessively deferential standard of review to the factual findings of the jury," Appellant's Brief at 16, Walker's contention is without merit. In his report and recommendation, the magistrate judge noted: "It is apparent that the jury did not believe the 1984 testimony of Davidson. Such disbelief cannot be deemed unreasonable. . . . It is not for this Court to weigh the credibility of the witnesses, or reach its own conclusion as to whether the evidence at the trial established guilt beyond a reasonable doubt." Report & Recommendation at 13-14 (citations omitted). *See also* District Court's March 9, 1994 Memorandum and Order at 3 ("The trier of fact has the responsibility to resolve conflicts in testimony, to weigh the evidence and draw reasonable inferences."). We agree. The district court properly rejected Walker's invitation to make credibility determinations and to decide whether the evidence established Walker's guilt beyond a reasonable doubt.

Accordingly, we AFFIRM the district court's decision denying Walker's petition for habeas corpus relief.

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defendant of a crime without evidence to support an essential element of the crime." *Speigner v. Jago*, 603 F.2d 1208, 1210 (6th Cir. 1979), *cert. denied*, 444 U.S. 1076 (1980).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 94-3389

RAYMOND WALKER,

Petitioner - Appellant,

v.

HARRY K. RUSSELL, Warden,

Respondent - Appellee.

Before: **Contie, Ryan,** and **Siler,** Circuit Judges.

JUDGMENT

(Filed Jun. 13, 1995)

ON APPEAL from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Issued as Mandate: July 5, 1995

COSTS: NONE

Filing Fee..... $
Printing..... $
Total..... $

A True Copy.

Attest:

/s/ Valeri Field
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAYMOND WALKER, Petitioner, vs. HARRY K. RUSSELL, WARDEN, Respondent.	:	CASE NO. 1:90CV1384 HON. GEORGE W. WHITE MEMORANDUM AND ORDER (Filed Mar. 9, 1994)

This is an action for writ of habeas corpus. The petitioner is presently serving a life sentence for first degree murder. The murder occurred on July 22, 1972. Petitioner was first tried in June, 1976. That trial ended with a hung jury. He was tried again in September, 1976 and was found guilty. The conviction was upheld by the Ohio Courts. In June, 1980 a writ of habeas corpus was granted and the action was remanded to the Stark County Common Pleas Court for retrial. The third trial was held in June 1984, and Petitioner was again convicted of first degree murder. The Petitioner appealed, raising insufficiency of the evidence, discriminatory use of preemptory challenges and the admissibility into evidence of the transcript of the 1976 testimony of an accomplice. The Ohio Court of Appeals affirmed Petitioner's conviction and the Ohio Supreme Court denied jurisdiction. The United States Supreme Court granted *certiorari* and remanded the case to the Ohio Court of Appeals for further consideration. The Court of Appeals remanded the case to the trial court for hearing on the prosecution's reasons for its use of preemptory challenges. The trial court ruled in the

prosecution's favor and sustained the conviction. The Court of Appeals affirmed the trial court and the Ohio Supreme Court denied jurisdiction. Upon receipt of the Respondent's return of writ the action was referred to a United States Magistrate Judge for Report and Recommendation. This matter is now before the Court upon the Petitioner's objections to the Magistrate Judge's Report and Recommendation that the petition for writ of habeas corpus be denied without further proceeding.

Petitioner contends that no rational trier of fact could have convicted him. He asserts that he was in the Cuyahoga County Jail on the day the murder was committed in Canton, Ohio. In *Jackson v. Virginia,* 443 U.S. 307, 324, 99 S.Ct. 2781, 2791, 61 L.Ed.2d 560 (1979), the Court held that in a challenge to a state court conviction, the Petitioner is entitled to habeas corpus relief if it is found that upon the record addressed at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. The proof requires such relevant evidence as a reasonable mind might accept to support a conclusion. *Brown v. Davis,* 752 F.2d 1142 (6th Cir. 1985).

Two accomplices testified at Walker's 1976 trial that he participated in the crime. The only significant difference between the 1976 and 1984 trials was the retraction by one of those accomplices. The other did not testify. During the accomplice's testimony, the Court became convinced that he did not remember the details of the incident so the transcript of his testimony in the 1976 trial was admitted.

Obviously, the jury did not believe the accomplice's testimony in the 1984 trial. The Court agrees with the

Magistrate Judge's statement that *"such disbelief cannot be unreasonable."* He stated that he could not remember who was with him when the murder was committed. That is extremely hard to believe considering that the accomplice is spending a major portion of his life in prison because of this incident. Yet he cannot remember who was with him at that time? It certainly was reasonable for a jury not to believe his contradictory 1984 testimony. The jury could believe his testimony in the 1976 trial. The trier of fact has the responsibility to resolve conflicts in testimony, to weigh the evidence and draw reasonable inferences. *Jackson v. Virginia,* 443 U.S. at 319, 99 S.Ct. at 2789.

Besides the accomplices, the prosecution presented several eyewitnesses who saw the petitioner at the scene of the murder. Also, testimony showed that jail procedures were somewhat careless. It cannot be determined that a rational jury could not have found proof of guilty beyond a reasonable doubt.

Accordingly, the objections to the Magistrate Judge's Report and Recommendation are overruled. The Magistrate Judge's Report and Recommendation is adopted. The petition for writ of habeas corpus is **dismissed** without further proceedings.

IT IS SO ORDERED.

/s/ George W. White
George W. White 3-8-94
UNITED STATES DISTRICT JUDGE

WHITE, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAYMOND WALKER, Petitioner v. HARRY K. RUSSELL, Warden, Respondent	)	ORDER CASE NO. 1:90CV1384 (Filed Mar. 9, 1994)

Pursuant to this Court's Memorandum and Order filed contemporaneously with this Order,

IT IS ORDERED that the objections to the Magistrate Judge's Report and Recommendation are overruled. The Magistrate Judge's Report and Recommendation is adopted. The petition for writ of haveas [sic] corpus is dismissed without further proceedings.

IT IS SO ORDERED.

/s/ George W. White
George W. White
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Raymond Walker,	:	Case No. 1:90CV1384
Plaintiff	:	Magistrate Judge David Perelman
v.	:	
Harry K. Russell, Warden,	:	Judge George W. White
Defendant	:	REPORT & RECOMMENDATION

This habeas corpus petition was filed by Raymond Walker on August 1, 1990, pursuant to 28 U.S.C. § 2254, to challenge the constitutionality of his imprisonment in a State correctional facility. Petitioner is presently serving a life sentence for first degree murder, arising out of the killing of Guy Mack, an off-duty police officer, while Petitioner was allegedly in the process of robbing an A&P grocery store. At trial Petitioner presented an alibi defense, asserting that he was incarcerated in the Cuyahoga County jail at the time of the robbery and murder.

This case has a long and convoluted procedural history.

The murder occurred on July 22, 1972, in Canton, Ohio. Petitioner was indicted on March 12, 1976. The indictment was precipitated by accusations against him by Warren Davidson and Fred Ogletree, both of whom had already been convicted of, and were serving prison sentences for, the commission of the same robbery/murder.

Petitioner was first tried in Stark County in June 1976. That trial ended with a hung jury.[1]

Petitioner was next tried commencing September 8, 1976 (this trial is referred to throughout this opinion as the "1976 trial"). He was convicted of first degree murder. That conviction was affirmed by both the Stark County Court of Appeals for the Fifth District and the Ohio Supreme Court.[2]

Petitioner then filed his first habeas corpus petition in this court. On August 14, 1980, this Magistrate Judge recommended that his petition be granted, for the reason that his trial was so infected with prejudicial improprieties and errors that he was denied due process of law. This Court, relying on *Jackson v. Virginia*, 443 U.S. 307 (1979), further recommended that Petitioner be released from custody and not be retried because there was insufficient evidence upon which a reasonable jury could have convicted.

District Judge Thomas adopted the Report and Recommendation of this Court as to the denial of due process of law, but did not adopt the determination that the admissible evidence was insufficient to support a conviction. Judge Thomas remanded the case to the Stark County Court for retrial. Both parties appealed the decision of the district court, and the Sixth Circuit Court of Appeals affirmed. *Walker v. Engle*, 703 F.2d 959 (6th Cir.), *cert. denied*, 464 U.S. 951 (1983).

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[1] Apparently at the point that the jury was discharged it stood ten to two in favor of acquittal.

[2] The United Stated Supreme Court denied certiorari.

On remand the trial was presided over in Stark County by Cuyahoga County Common Pleas Judge Michael Corrigan. On June 29, 1984, Petitioner was again convicted by a jury of first degree murder.

On appeal Petitioner raised four assignments of error, the first two of which related to the sufficiency of the evidence. The third assignment of error related to the allegedly discriminatory use of peremptory challenges by the prosecution, while the fourth challenged the admission into evidence of the transcript of the 1976 trial testimony of Davidson, in which he had implicated Petitioner in the crime.

The court of appeals affirmed Petitioner's conviction, and the Ohio Supreme Court denied jurisdiction. The United States Supreme Court thereafter granted certiorari, and remanded the case to the Ohio court of appeals for further consideration of the peremptory challenge issue in light of the ruling in *Griffith v. Kentucky*, 479 U.S. 314 (1987). The court of appeals, in turn, remanded to the trial court for a hearing on the issue of the prosecution's reasons for its use of peremptory challenges.

The trial court found that the reasons offered by the prosecution for the peremptory challenges overcame a challenge based upon *Griffith*, and sustained the conviction. The court of appeals affirmed that holding, and the Ohio Supreme Court and United States Supreme Court each denied jurisdiction.

This habeas corpus petition followed.

In his petition Petitioner raised two claims for relief, as follows:

> Ground One: No rational trier of fact could have convicted.
>
> Supporting FACTS: I was in the Cuyahoga County Jail, Cleveland, Ohio, on the day that the murder was committed in Canton, Ohio. The two eyewitnesses who positively identified me had picked the wrong person out of a lineup; the two accomplices in the robbery during which the murder was committed recanted testimony given at a previous trial identifying me as the murderer; one testified, admitted he lied and stated positively that I was not with them during the robbery and did not commit the murder; and the other took the Fifth Amendment.
>
> Ground two: Prosecutor's preemptory [sic] challenge of the only black on the jury panel.
>
> Supporting FACTS: The only black juror was excused.

In the Return of Writ Respondent conceded that Petitioner has exhausted his state remedies. On the merits, Respondent argued that there was sufficient evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979) to support Petitioner's conviction. Respondent further contended that the prosecution's peremptory challenge of the only black juror on Petitioner's panel was not due to race but, rather, was for non-discriminatory reasons.

In the brief in support of habeas corpus Petitioner has abandoned his peremptory challenge claim, and now asserts that "[t]he sole proposition of law upon which we choose to rely in this case is that set forth in *Jackson*. . . . " In support of that claim Petitioner recites facts as culled

from the transcript of the 1976 trial[3] (presumably from the second trial which resulted in conviction) and from the transcript of the 1984 trial.[4]

In evaluating the merits of the present petition this Court has reviewed the briefs and submissions of the parties, the entire transcript of the 1984 trial (except the voir dire), and the opinions of the courts which preceded this petition. After such exhaustive review, this Court is constrained to conclude that the petition lacks merit.

Based upon that review and this Court's prior ruling it appears that, with some exceptions which will be discussed in this opinion, the evidence presented in the 1984 trial was comparable to the evidence properly admissible in Petitioner's 1976 trial, which was briefly reviewed in the opinion of the Sixth Circuit Court of Appeals affirming the decision of Judge Thomas in the prior proceeding in habeas corpus. With the exception of one evidentiary issue to be discussed hereinafter, this Court notes, and Petitioner acknowledges, that the 1984 trial was essentially free of error.

As was true in the 1976 trial, in 1984 the State's case against Petitioner consisted primarily of testimony of witnesses who stated they saw Petitioner at the scene of the crime, or in the area prior to the crime. Those witnesses included Mrs. Willa May Hart, who testified that she saw someone who had bad skin similar to Petitioner's drive

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[3] The transcript from the 1976 trial is not a part of the record before this Court.

[4] In support of the petition Petitioner also submitted a copy of this Court's 1980 Report and Recommendation.

past her house near the A & P just before, and again just after, she heard gunshots. Petitioner was also identified by the wife of the victim, Mrs. Mable Mack, who testified that she was with her husband at the time he was shot. Although her testimony was somewhat equivocal, she stated "without a reasonable doubt that he is the man that was at cash register three." Renee Clark, a customer at the A & P when the shooting occurred, also identified Petitioner as the gunman.

In addition to presenting those eyewitnesses who had been at or around the scene, the prosecution sought to frustrate Petitioner's alibi defense by presenting testimony from a friend of Petitioner, Clarence Cash, that he had met with Petitioner outside of jail in June 1972 when, according to Petitioner's alibi evidence, Petitioner was supposed to have been in jail.

On cross-examination the defense attempted to minimize the importance of the eyewitness identifications by bringing out the fact that before the 1976 trial Mrs. Mack and Ms. Clark had identified other men in a line-up in which Petitioner was present.

Petitioner presented evidence from inmates at Cuyahoga County Jail who testified that they were imprisoned with Petitioner during July of 1972, and that Petitioner did not leave the jail. That testimony was corroborated by prison records.

The most significant difference between the evidence presented in the 1984 trial and the 1976 trial (other than the absence of the extensive prejudicial error in the 1984 trial which was present in the 1976 trial) concerned the

testimony of Petitioner's alleged accomplices Davidson and Ogletree.

Prior to the testimony of Davidson, who was called as a prosecution witness, the trial court conducted a voir dire to determine whether Davidson would refuse to testify. Davidson assured the court that he would not refuse. Immediately upon commencement of questioning by the prosecution, however, it became clear that Davidson was recanting his 1976 trial testimony (and his grand jury testimony) in which he had sworn that Petitioner was the moving force behind the robbery and that Petitioner was the person who shot Mr. Mack. Instead, Davidson stated that Petitioner was not with him on the day of the offense, and that he had lied in his previous testimony to the contrary.

The trial court then declared Davidson to be a hostile witness, and the prosecution was permitted to impeach him using his grand jury testimony and his previous trial testimony. During the course of the impeachment the prosecutor read Davidson's earlier statements, in which Davidson described Petitioner's active involvement in the crime from its onset, and in which he testified that Petitioner had a gun.[5]

Although Davidson recanted his earlier testimony, he did not deny having been involved in a robbery of the A & P on July 22, 1972, in the course of which a shooting occurred. He claimed lack of memory as to many aspects of the crime, and as to much of the content of his earlier

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[5] Davidson had not gone into the A & P and, therefore, was not an eyewitness to the shooting.

testimony. For instance, he maintained that he could not remember who was with him at the time of the robbery; who was with him the day before, at an aborted attempt at the robbery; whether anybody had a gun; or, how many cars they brought to the scene. He did, nevertheless, remember stealing a car in preparation for the robbery, going to the A & P and waiting while his unnamed accomplice(s) committed the robbery, and leaving the scene and driving through Canton.

Davidson stated with certainty that Petitioner was not with him on July 21 or 22, 1972. He was equally positive in stating that he had only testified as to Petitioner's participation in the robbery/killing because the prosecutor's office had promised him early release from the penitentiary in exchange for such testimony, explaining that he would have told any lie to get released from the penitentiary.

The trial court interrupted the testimony to conduct further voir dire of Davidson out of the presence of the jury. The court asked Davidson "Are you telling us that you do have a lack of memory concerning the events?", to which Davidson answered "Yes, sir." The court then had a discussion with counsel regarding the possibility of admitting Davidson's prior testimony as substantive evidence, pursuant to Rule 804 of the Ohio Rules of Evidence. Following this discussion the trial court allowed the prosecution to complete its questioning of Davidson before the jury.

The defense was then permitted to cross-examine Davidson. That cross-examination included the following:

Q. All right. And now that you are in the penitentiary you would do anything to get out of the penitentiary?

A. Yes, sir.

Q. Because you don't like being in there.

A. No, sir.

Q. Now having that in mind, you were approached [in 1976] to testify against Raymond Walker?

A. Yes, sir.

Q. And something was said to you that something good was going to happen to you if you would testify?

A. Yes, sir.

Q. What was said to you that was going to happen to you if you testified?

A. That I might be able to get out of the penitentiary and they showed me one of his pictures and they said is that him and I said yes that's him.

Q. Just like that?

A. Just like that.

Q. And what was your reason for saying that's him?

A. They offered to let me go.

Q. Now, earlier you said in response to your questions from Mr. Henning, you said you would lie on him to get out of the penitentiary.

A. Yes, sir.

Q. Isn't that what you said?

A. And I would.

Q. Explain what you mean by that.

A. If anyone come up to me and say I can help you get out of the penitentiary if you say this officer here choked that one and I will say be did it to get out of the penitentiary [sic].

* * *

[Q.] Now, on the day that Guy Mack was killed you didn't shoot him, you didn't fire the weapon is that right?

A. Yes, sir.

Q. Was Raymond Walker with you?

A. No, sir.

Q. Do you know where he was?

A. No, sir.

Q. You had come down the day before?

A. Yes, sir.

Q. Was Raymond Walker with you that day?

A. No, sir.

Q. Do you know where Raymond was?

A. No, sir.

Q. And your testimony is that you, when you testified that Raymond Walker was with you, you lied?

A. Yes, sir.

After this testimony the prosecution attempted to impeach Davidson's recantation by bringing on Deputy L. P. Lamb who testified that he was a Deputy Sheriff in Stark County and that he was in court that day supervising Warren Davidson. He stated that while the court was in recess during Davidson's testimony Davidson had muttered that "there is no damn way I am going back to Lucasville to testify against Walker with the amount of power that man wheels [sic, wields]."[6]

Fred Ogletree, the other man convicted, prior to Petitioner's first trial, as an accomplice to the murder and robbery, flatly refused to testify when called as a prosecution witness at the 1984 trial.

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[6] It is clear from the transcript of an in-chambers discussion between the court and counsel, that "that man" allegedly referred to by Mr. Davidson was defense counsel Mr. Stanley Tolliver. The trial court ordered that, although the testimony of Deputy Lamb would be admitted, he would not be permitted to say in front of the jury who "that man" referred to.

This Court is troubled by the fact that during closing argument the prosecution improperly suggested that "that man" referred to Petitioner. Petitioner does not point this out in his brief or contend that such argument was erroneous. While this Court does not believe that the statement during closing argument, especially in light of the trial court's instruction to the jury that counsels' arguments do not constitute evidence, was of constitutional magnitude, the implication that Davidson felt threatened by Petitioner could have been a significant factor in the jury's disbelief of Davidson's testimony denying Petitioner's involvement. Because this argument is not urged upon this Court, however, and because there is proper evidence upon which the jury could have rejected Davidson's testimony, this Court does not find this issue to be dispositive.

The trial court declared both Ogletree and Davidson to be unavailable within the meaning of Rule 804 of the Ohio Rules of Evidence, and admitted their 1976 trial testimony as substantive evidence, after giving both the defense and prosecution an opportunity to make specific objections to portions of that testimony. The parts of the transcript which the trial court found to be inadmissible were redacted.

The testimony of Ogletree and Davidson was read in open court, but the transcripts themselves were not admitted for review by the jury. Both accomplices testified at the 1976 trial that Petitioner was involved in the robbery, and Ogletree further testified that he saw petitioner shoot Guy Mack.

Petitioner does not argue in his petition that the admission of the prior testimony of either Ogletree or Davidson amounted to constitutional error.[7] Rather, Petitioner maintains that the evidence as adduced at trial, especially in light of Davidson's disavowal of his earlier

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[7] The Ohio Court of Appeals for the Fifth Appellate District found that admission of Davidson's testimony pursuant to Ohio R. Evid. 804(B)(1) was proper under Ohio law. As this Court is bound by Ohio's interpretation of its own law, the question of the propriety of the admission of the prior testimony as it relates to the Ohio rules of evidence is not open to review herein. Without regard to the issue of whether there was an evidentiary error with respect to admission of Davidson's prior testimony the admission of such testimony would not rise to a level of a deprivation of Petitioner's right of Confrontation, as the defense was permitted to cross-examine Davidson at the time of his earlier testimony and at the 1984 trial with respect to his recantation of that testimony. *United States v. Owens*, 484 U.S. 554 (1988).

testimony, was insufficient to support a conviction. In so arguing Petitioner substantially relies on this Court's previous conclusion that there was insufficient evidence adduced at the 1976 trial to convict Petitioner.

Petitioner's reliance on this Court's earlier opinion is plainly misplaced. That conclusion was rejected by both Judge Thomas and the Sixth Circuit Court of Appeals. Whatever this Court's belief may have been regarding the sufficiency of the evidence as adduced at the 1976 trial, that opinion must give way to the holdings of the higher courts. The only issue before this Court at this time is whether there was sufficient evidence at Petitioner's 1984 trial to withstand a constitutional challenge, a proposition which must be controlled by the record of that trial measured against the standard of *Jackson*, 443 U.S. at 307.

Insofar as this Court can ascertain, the only significant difference between the evidence in the 1984 trial and the competent evidence received at the 1976 trial was the testimony of Davidson at each. Therefore, the only question before this Court is whether Davidson's retraction of his earlier testimony and his insistence in 1984 that Petitioner was not involved in the crime so tips the scales in favor of Petitioner as to render his 1984 conviction unreasonable within the meaning of *Jackson*.

The standard enunciated in *Jackson* "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The United States Supreme Court recently reemphasized the deference federal courts are to give factual determinations in state court convictions in

Wright v. West, 60 U.S.L.W. 4639, 4644 (U.S. June 19, 1992), wherein the Court stated that "[i]n *Jackson*, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review."

It is apparent that the jury did not believe the 1984 testimony of Davidson. Such disbelief cannot be deemed unreasonable. Davidson admitted that he had previously lied, and that he would lie if he though it would benefit him. Furthermore, Davidson's lack of memory with respect to who was with him at the time of the robbery, and other aspects of the crime, did nothing to further his credibility. The jury could have ignored his testimony altogether and relied solely on the other evidence before it, or simply believed his testimony from the 1976 trial. It is not for this Court to weigh the credibility of the witnesses, or reach its own conclusion as to whether the evidence at the trial established guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Walker*, 703 F.2d at 969.

Although several aspects of this case remain unsettling to this Court, this Court cannot say that Davidson's 1984 testimony compels the conclusion that no reasonable jury could have found the evidence sufficient to convict. This Court must conclude that a rational jury assessing the facts of this case could have found beyond a reasonable doubt that Petitioner was guilty of first degree murder. *Compare Deel v. Jago*, No. 91-3181 (6th Cir. June 18, 1992). Such conclusion is virtually mandated by the ruling of the Sixth Circuit holding that looking to the competent evidence adduced at the 1976 trial Petitioner was not entitled, as a matter of federal constitutional law, to an

order of discharge by reason of insufficiency of the evidence.

In conclusion, this Court recommends that this petition be denied without further proceedings.

/s/ David S. Perelman
DAVID S. PERELMAN
United States
Magistrate Judge

DATE: July 8, 1992

U.S. CONST., AMEND XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.